

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
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)
Closed Captioning and Video)
Description of Video Programming)
)
Implementation of Section 305 of)
the Telecommunications Act of 1996)
)
Video Programming Accessibility)

MM Docket No. 95-176

REPLY COMMENTS OF HOME BOX OFFICE

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Time Warner Entertainment
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SUMMARY

In enacting Section 305 of the Telecommunications Act of 1996, Congress recognized the significant constraints that would face program producers, owners, and distributors in their efforts to increase the amount of programming that is available to the hearing impaired through closed captioning. Consequently, Congress gave the Commission substantial discretion to determine how best to achieve the legislation's captioning goals while preserving the quality and diversity of programming available to all viewers.

HBO submits that the Commission must exercise that discretion in establishing realistic timetables for the phase-in of closed captioning, and in fashioning appropriate exemptions. Program networks, program producers, and program providers have placed in the record ample information concerning the sizable amount of captioned programming available, the costs associated with captioning such programming, and the logistical and economic challenges facing program owners, providers, and distributors as a result of the new captioning requirements. HBO submits that the multi-year transition, library and exemption proposals advanced by these parties are more consistent with Congress' intent than are the less realistic measures, in some cases calling for 100% captioning within two years, advanced by some advocates for the hearing impaired.

Specifically, HBO submits that the Commission should:

- (1) place responsibility for compliance with the closed captioning rules on program distributors;
- (2) allow for phase-in of closed captioning of non-exempt, new programming over a ten-year period with an 80% captioning maximum;
- (3) include programming that is currently captioned in any percentage calculation for purposes of assessing compliance with the captioning rules;
- (4) afford MVPDs the flexibility to choose whether to satisfy their requirements on a system-wide or channel-by-channel basis;
- (5) forbear from setting quantitative benchmarks for captioning of library programming;
- (6) carve out appropriate exemptions, including an exemption for interstitial material; and
- (7) refrain from imposing additional technical or non-technical requirements for quality and accuracy.

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REPLY COMMENTS OF HOME BOX OFFICE

Home Box Office ("HBO"), a division of Time Warner Entertainment Company, L.P. ("TWE"), by its attorneys, hereby submits its reply to the comments filed in response to the Notice of Proposed Rulemaking ("Notice"), released in the above-captioned proceeding on January 17, 1997.¹

I. INTRODUCTION

In large part, the comments submitted with regard to the Commission's proposed rules and implementation schedules for captioning of video programming, as required by Section 305 of the Telecommunications Act of 1996 ("1996 Act"),² can be

¹ FCC 97-4, released January 17, 1997.

² Pub.L. 104-104, 110 Stat. 56 (1996).

divided into several broad categories, depending upon the interests of the commenter. Advocates for the hearing impaired predictably take issue with the Commission's proposed eight to ten year phase-in schedule for captioning of new programming. These parties generally favor an expedited two to three year implementation schedule for captioning of all video programming, with very limited exemptions. Similarly, providers of captioning services, perhaps sensing business opportunities, urge rapid implementation of captioning requirements. Their enthusiasm is tempered only by their current inability to offer adequate supply in response to immediate demand.

Program networks, program producers, and program providers, on the other hand, have placed in the record ample information concerning the sizable amount of captioned programming available, the costs associated with captioning such programming, and the logistical and economic challenges facing program owners, providers, and distributors as a result of the new captioning requirements. These parties, like HBO, largely support the Commission's proposed multi-year transition period for new programming, argue against quantitative benchmarks for captioning of library programming, and have outlined specific and compelling needs for several categories of exemptions.

In reply, HBO wishes to emphasize that much of the debate in this rulemaking proceeding is misplaced. Advocates for the hearing impaired continue to base their arguments in favor of

100% closed captioning near-term on the importance of captioning services in improving the quality of life for the deaf and hard of hearing. In doing so, they uniformly ignore the crux of the difficult task facing the Commission, and fail to acknowledge that regulation of closed captioning has the potential to impact all viewers negatively through rising costs and fewer programming options.

Had Congress intended that Section 305 serve as a guarantee that all video programming be closed captioned near-term, as advocates for the hearing impaired and certain of the captioning industry repeatedly suggest, the task before the Commission would be an uncomplicated one. The Commission simply could adopt a blanket rule requiring, for example, that all programming aired over video distribution systems be closed captioned within two years. Congress, however, has entrusted the Commission with a far more formidable and delicate task -- to balance the undisputed interest of the hearing impaired in having access to more video programming through captioning while preserving the quality and diversity of programming available to all viewers.

The Commission, then, should focus not on whether closed captioning is an important and laudable goal -- that fact has been acknowledged by Congress, the Commission, and virtually every commenter in this proceeding -- but on the challenge of how best to craft rules that serve the needs of the few consistent with Congress' specific instruction that the Commission not forsake the needs of the many. Congress has

expressly directed the Commission to "establish reasonable timetables and schedules" for closed captioning that are not "economically burdensome on program providers, distributors or the owners of such programs."³ HBO submits, that, as a general matter, the multi-year transition, library, and exemption proposals advanced by HBO, programmers, and program distributors are more consistent with this intent than the less realistic measures advocated by representatives of the hearing impaired community.

II. RESPONSIBILITY FOR CAPTIONING SHOULD REST WITH PROGRAM DISTRIBUTORS

As indicated in its initial comments in this proceeding, HBO supports the Commission's tentative conclusion that responsibility for compliance with the closed captioning requirements should rest with broadcasters or multichannel video program distributors ("MVPDs") that have the direct contact with the consumers. As A&E points out, "[t]he Commission has never exercised direct regulatory jurisdiction in the past over networks that are not also licensed to use the spectrum, or over producers of video programming." A&E Comments at 18. Moreover, there is no indication that Congress intended to vest the FCC with jurisdiction over other

³ H.R. Report 104-458, 104th Cong., 2d Sess. ("Conference Report") (1996) at 183.

parties in the production and distribution chain, including the producer, the copyright holder, the syndicator, or others.

In this respect, HBO concurs with C-SPAN that a "nearly offhand statement in the legislative report does not constitute a sufficient basis upon which to break such jurisdictional ground." C-SPAN Comments at 7. Accordingly, the Commission properly has refrained from making a "jurisdictional grab" that would give it authority over the creative community, and has avoided raising considerable constitutional questions given the potential for regulation of speech produced, owned or distributed by entities traditionally not subject to such jurisdiction. Id.

III. TRANSITION RULES FOR NON-EXEMPT NEW PROGRAMMING

A. Captioning of New Programming Should Be Phased-In Over a Ten Year Period With An 80% Captioning Maximum

Contrary to the overly optimistic view of some parties to this proceeding, the record amply demonstrates that the goal of promoting accessibility to television programming through closed captioning will take time. The Commission's requirements must be phased-in over a long enough period to allow the market to adjust and respond to increased demand. To that end, the two to three year transition period generally suggested by the captioning industry and advocates for the hearing impaired will not suffice.

An abbreviated transition period would not allow the programming industry to absorb the significant costs that will

be imposed by, or to overcome the logistical problems inherent in, any captioning requirement. Moreover, given that the Commission, in proposing to place the responsibility for captioning on providers, has contemplated a "new" relationship between such providers and program producers or networks, existing programming contracts should be allowed to run their course.

Further, the record demonstrates ample support for setting the ultimate benchmark for captioning of non-exempt new programming at less than 100%. As HBO suggested in proposing an 80% maximum on captioning of new programming, such a de minimis exemption would abbreviate the number of instances where programming decisions center solely on whether or not a program is captioned. Leaving a limited amount of "wiggle room," as C-SPAN terms it, would accommodate those situations where the unanticipated occurs, would reduce administrative burdens, and would leave sufficient flexibility to exhibit programs that otherwise might not air.

It would be impossible for the Commission to anticipate in advance all conceivable scenarios in which captioning would impose an undue burden, particularly given the newness of the requirement. "Rather than cast exemptions in stone, and relegate all other situations to costly and time consuming 'undue burden' showings," as NCTA states, NCTA Comments at 13, the Commission should establish a maximum benchmark that is less than 100% for all new, non-exempt programming at the end of the transition period. As detailed in its initial

comments, HBO believes that an 80% captioning benchmark would allow programmers sufficient flexibility to schedule a limited amount of programming that, for whatever reason, is not captioned. Otherwise, HBO submits, the Commission must develop a much longer list of particular exemptions than it has heretofore considered, such as exemptions for programs received or created shortly before presentation, live "breaking" events, programs that cannot be captioned because of the unavailability of captioning personnel or the malfunctioning of captioning equipment, etc. In addition, the Commission would have to establish an "emergency relief" capability and be prepared to rule on requests for waivers that surely would arise at the last minute before programs are scheduled to air.

Finally, with respect to the phase-in of captioning requirements for non-exempt new programming, HBO recommends that the Commission clarify precisely how the agency will evaluate compliance with whatever benchmarks ultimately are adopted. HBO believes that an annual assessment, conducted at the end of each calendar year, would afford programmers sufficient flexibility to schedule programming in response to consumer demand, by recognizing that there may exist legitimate reasons why more captioned programming airs in certain weeks or months than others. Further, assuming an annual assessment, HBO submits that a reasonable interpretation of the Commission's proposal to require that 25% of non-exempt new programming be captioned after three years, 50% after five

years, 75% after seven years, and 100% after ten years⁴ would require the parties responsible to have the capability, by the end of the third year, to caption 25% of their new programming aired during the fourth year following the rule's effective date, with the actual assessment coming at the end of year four. The same principle would apply to subsequent benchmarks.

B. Programming That Currently Is Captioned Should Count Toward the Commission's Benchmarks

Certain commenters, such as the Consumer Action Network and Self Help for Hard of Hearing People, Inc. ("SHHH") propose that the Commission's benchmarks for captioning of new programming should not include programming that already is captioned. Such a proposal plainly is inequitable. In essence, by dismissing the considerable captioning efforts of those programmers, such as HBO, the broadcast networks and others, who have, without the prod of regulation, devoted considerable resources toward captioning the large majority of their programming, the rule would unjustly penalize performers whose voluntary efforts to date should be commended. Further, the administrative burden resulting from this proposal would be considerable. It would require each individual network or MVPD not only to assess overall compliance with the Commission's captioning benchmarks, but also to determine

⁴ As already discussed, HBO believes that this ultimate benchmark should be set at 80%.

which of their programs was captioned and when. The result would be that each program network would have a different baseline from which to calculate compliance. This requirement would be daunting, confusing to programmers and consumers alike, and inconsistent with Congress' intent that unreasonable economic burdens not be placed on program owners, producers, or distributors.

Media Captioning Services claims that by allowing video programming providers that currently provide in excess of the proposed level of captioning to maintain the status quo, the Commission will place newer video programmers at an unfair competitive disadvantage. Both Congress, the Commission and numerous commenters in this proceeding, however, have proposed far more equitable methods for "leveling the playing field," given the new captioning requirements, without unduly penalizing certain participants. First, an adequate phase-in period would allow sufficient time for newer programmers to "ramp up," acquire necessary captioning services, and distribute increased costs. Moreover, the statute intentionally leaves sufficient latitude for certain program services to be exempt from the captioning requirements based, for example, on "the impact on operations of," "the financial resources of," or the cost of captioning relative to audience share.⁵

⁵ Conference Report at 183.

The suggestion by certain commenters that the discounting of existing captioned programming is necessary to protect against a "backslide" in the amount of available captioning similarly is flawed. Without any closed captioning requirements whatsoever, in 1996 HBO offered captioning on 86% of the complete programming schedule and 96% of the prime time schedule on the HBO program service. For Cinemax, approximately 58% of the complete schedule, and 72% of the prime time schedule, respectively, were captioned. Other programmers, including the broadcast networks, have achieved comparable or greater captioning levels.

The industry's entirely voluntary achievements in the captioning field to date are a testament to the impact of marketplace forces in creating captioning initiatives. HBO simply would not voluntarily have allocated the sizable resources it has to captioning had there not been a marketplace reason to make its programming accessible to a broad range of viewers, including the hearing impaired.⁶ The record in this proceeding offers no evidence whatsoever that the marketplace forces that have spurred certain programmers to work steadily to offer ever-increasing amounts of captioned programming will cease to work. To suggest that there will be a "backslide" in the amount of captioning should the

⁶ A similar marketplace dynamic has caused HBO to increase the amount of the HBO programming service delivered with stereo sound -- from 61% in 1990 to 91% in 1996.

Commission give credit for existing captioned programming simply is illogical.

C. MVPDs Should Be Afforded the Flexibility To Choose Whether to Satisfy Their Captioning Requirements on a System-Wide or Channel-by-Channel Basis

In its initial comments in this proceeding, HBO recommended that the Commission apply the percentages of programming that must be captioned by MVPDs on a system-wide basis. There is a considerable diversity of opinion among the commenters on this issue. Upon reflection, HBO believes that both the channel-by-channel and system-wide approach have merit, and recommends that the Commission allow MVPDs to elect either option as the means through which they will comply.

As HBO indicated in its initial comments, a system-wide approach would afford MVPDs a great degree of flexibility in determining which program networks they will carry. Specifically, MVPDs would have the ability to satisfy the captioning requirements by carrying certain networks with a high percentage of captioning while continuing or electing to carry others with no closed captioning at all. System-wide application would serve to preserve program diversity, therefore, by facilitating the carriage of networks, such as live sports services or fledgling networks with limited penetration, for which closed captioning is impractical or infeasible.

On the other hand, however, applying percentages on a per-channel basis would alleviate some of the significant

burdens placed upon MVPDs by the Commission's requirements. Channel-by-channel application would permit MVPDs to rely on each of their networks to certify as to compliance, thus avoiding a more complicated system-wide calculation.

By affording MVPDs this additional flexibility, the Commission would facilitate MVPDs' ability to assemble program packages and tailor closed captioning arrangements to suit the needs of their customers. The Commission should, therefore, allow MVPDs to elect either option.

IV. THE FCC SHOULD NOT SET QUANTITATIVE BENCHMARKS FOR CAPTIONING OF LIBRARY PROGRAMMING BY A DATE CERTAIN

A. Forbearance from Establishing Quantitative Benchmarks for Library Programming Is Consistent with Congressional Intent

The 1996 Act requires the Commission to adopt regulations to "maximize" the captioning of "library" programming (i.e., programming first distributed before the effective date of these regulations), except to the extent it would be economically burdensome to provide such captioning. By applying this lesser standard -- to "maximize accessibility" as opposed to the "make fully accessible" standard applied to "new" programming -- it is clear that Congress recognized that the burdens associated with the captioning of library programming would be substantial, particularly given the potential benefits over the long term.

HBO submits that the Commission should forbear from imposing a quantitative benchmark for the closed captioning of library programming by a date certain. Such forbearance would

be fully consistent with Congress' directive that the Commission "maximize accessibility" to library programming for the hearing impaired. As the record illustrates, imposition of an artificial mandatory captioning requirement for library programming would serve to keep diverse programming away from the public simply because it would be uneconomical to caption this programming. Such a result directly contravenes Congress' stated intent that captioning rules should not "result in . . . previously produced programming not being aired due to the cost of captions."⁷

B. Imposition of a Quantitative Benchmark for Captioning of Library Programming Will Siphon Resources that Could Otherwise Be Devoted to Captioning New Programming

As the A&E Television Network pointedly states, "[m]illions of dollars devoted to captioning existing programming is millions of dollars denied to creating new programs." A&E Comments at 12. Similarly, millions of dollars devoted to captioning existing programming is millions of dollars denied to captioning of new programming. In crafting its rules, the Commission must expressly recognize that the resources that may be devoted to captioning of all programming, whether "new" or "library" programming, are finite. Given limited resources, HBO submits that the Commission should adopt rules which result in resources being

⁷ H.R. Report 104-204, 104th Cong., 1st Sess. (1995) at 113-14.

devoted to those areas where they will achieve the maximum benefit, i.e., to increase the overall percentage of captioned programming available over the long term. To require that a certain percentage (e.g., 75 percent, as suggested by some commenters) of library programming be captioned by a date certain would be counterproductive to the overall goals of Congress, because it would siphon resources away from the captioning of new programming.

Given that Section 305's primary intent is to increase the overall percentage of programming that is closed captioned, it makes far more sense for the finite resources of program producers, owners and distributors to be allocated toward captioning non-exempt new programming -- the programming with the largest potential audience and the longest shelf life. According to HBO's in-house research, "new" programming has a far larger viewing audience than does library programming.⁸ HBO suggests that except for those networks devoted to "classic" television, which carry library product almost exclusively, the same ratings results would be evident. Thus, for most networks, the highest level of viewership will be directed to new programming. To maximize the benefits of captioning resources, therefore, it makes sense to devote them to the new programming.

⁸ For purposes of this discussion, "library" programming is defined as program titles that did not premiere within the past year.

Moreover, in the long run, captioning of an artificially set percentage of "library" programming will not prove a wise investment. Five years from now, much of the programming which falls under the Commission's "library" definition may no longer be exhibited by the program networks, having been replaced by "old" programming that is produced, under the Commission's rules governing "new" programming, in captioned format today. To expend considerable resources toward captioning programming with more limited usefulness than newer programming would amount to a waste of such resources.

Finally, if the Commission establishes benchmarks and timetables for library product, it will, of necessity, have to lengthen the transition period for new programming. There simply are not sufficient captioning resources available to achieve the Commission's proposed transition schedule for new programming if, placed on top of this requirement, there is a comparable rule provision that would mandate the captioning of certain levels of library programming by dates certain.

C. Allowing For a Natural "Phase-Out" of "Old" Programming without a Captioning Retrofit Is Consistent With Previous Commission Action

A mandatory captioning requirement for library programming would render such programming obsolete before its time. Allowing for the natural "phase-out" of older, uncaptioned programming would be more consistent with previous Commission policies.

For example, in October of 1990, the Television Decoder Circuitry Act of 1990 ("Decoder Act") was enacted into law.⁹ The Decoder Act, like Section 305, had the stated intent of serving the needs of the hearing impaired and expanding the accessibility of closed captioning technology.

Pursuant to the statute, the Commission promulgated rules which required that television receivers manufactured after July 1, 1993 utilize certain performance and display standards for closed-caption decoder circuitry.¹⁰ The Commission did not, however, require that existing television sets be retrofitted with such decoder circuitry, or mandate that consumers dispose of functioning television sets manufactured before enactment of the new standards on or before a date certain. In this context, it seems unthinkable to infer that Congress' intent was to render perfectly good television sets obsolete outside of the natural course; the large majority of consumers surely would have rebelled at such a suggestion, and the Commission never considered such a requirement in promulgating the rules to effect the statute.¹¹

⁹ Pub. L. 101-431.

¹⁰ *In the Matter of Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd 2419 (1991).

¹¹ Section 551 of the 1996 Act contains a similar provision, requiring that all television sets shipped in interstate commerce or manufactured in the United States which have a picture screen 13 inches or greater in size be equipped with an apparatus designed to enable viewers to block display of all programs with a common rating. Presumably, in its upcoming rulemaking proceeding

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In the same way, it is unreasonable to suggest that library programming be "retrofitted" with captioning or, rather than being aired, be condemned to decay in a vault before its time as a result of captioning regulation. Library programming will gradually be replaced with new programming over time; thus, natural forces will serve to increase the amount of captioned programming exhibited to the American public.

D. An Artificial Captioning Benchmark for Library Programming Would Prove Unworkable, and Unfairly Burden Certain Parties

Finally, any number of commenters in this proceeding have demonstrated that an artificial requirement that a certain percentage of library programming be captioned by a date certain would be wholly unworkable given the volume of programming product in the hands of both program owners and program distributors. There are currently many hours of theatrical movies, network re-runs and other previously exhibited programming without captions that local broadcast stations, cable systems and satellite distributors provide to the public every year. Under the Commission's proposed rules, it is these providers who would bear the responsibility for ensuring that this programming is captioned. As discussed

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enacting this "v-chip" provision, the Commission will not propose that television sets manufactured prior to the effective date of the rule be retrofitted with a v-chip or discarded.

above, especially where the costs of captioning cannot be recouped through wide distribution or repeat airings, uncaptioned library programming may simply be withheld from the public.

Such a result not only contravenes Congressional intent but would unfairly impact certain parties. There are undoubtedly program distributors or program networks, some of whom are parties to this proceeding, that have, prior to the initiation of these proceedings, purchased libraries with the intent to make the uncaptioned materials in them a substantial portion of their programming. Requiring the owners of such programming now to assume the costs of closed captioning (which would likely, according to the MPAA, quadruple the overall cost of the programming) as the price for further use of their video libraries would be grossly unfair.

For all these reasons, the Commission should forbear from adopting quantitative benchmarks with respect to captioning of library programming. Not only will older programming eventually be replaced with newer, captioned programming, the same market forces that have already led to the captioning of much new television programming will ultimately result in the captioning of widely disseminated library programming.

V. EXEMPTIONS

The plain meaning of Section 305 as well as its legislative history makes clear that, in order to preserve the production and distribution of quality, diverse programming in the United States, Congress intended for the Commission to

allow for appropriate exemptions. In evaluating the need for such exemptions, HBO reiterates that captioning costs should not be considered in the abstract, but assessed in relation to the relative benefits, the audience served, and the cost of captioning in relation to production costs for the program to be captioned. In this regard, HBO believes that the list of general exemptions should be more expansive than limited, and include, at a minimum, interstitial material, live music performances, certain foreign language programming, and, as suggested by other commenters in this proceeding, programming that is primarily textual in nature. As already discussed, the Commission also should create a de minimis general exemption by setting the maximum benchmark for captioning of new, non-exempt programming at 80%. Finally, the Commission should make clear that exemptions for particular programming or programming services, whether obtained by virtue of a general exemption category, or through waiver, are permanent, not temporary. To dictate otherwise would create uncertainty and result in additional administrative burdens for both the Commission and the parties impacted by the rule.

HBO is particularly convinced of the need for a general exemption for interstitial material, meaning content fifteen minutes or less in length. As described in HBO's initial comments in this proceeding, because of its promotional nature, much of the interstitial programming aired on HBO is produced within a tight time-frame and has an extremely short shelf life. Further, the interstitial material usually

contains on-screen graphics, or "slates," that provide the pertinent information that is contained in the program audio.

Certain commenters, such as SHHH and Consumer Action Network, suggest that interstitial material is important to the hearing impaired, and therefore should not be granted a blanket exemption from the closed captioning requirements. In support of their position, these commenters suggest that it is possible to caption such programming.

Again, HBO believes that the arguments in favor of excluding interstitials from the Commission's exemptions are misplaced. The issue is not whether interstitial material is useful and/or whether it is technically feasible to caption this short-form programming. As Congress specifically has directed, in considering exemptions, the Commission must take into consideration the nature and cost of providing closed captions, the cost of captioning relative to the size of the market served or the audience share, and the existence of alternative means of providing access to the hearing impaired. Conference Report at 183.

Under this balancing test, interstitial material qualifies for a general exemption. As any number of commenters in this proceeding, including HBO, Encore, CBS, NBC, PRIMESTAR and others, have noted, the marginal benefit of captioning interstitial material simply does not outweigh the cost and logistical burdens associated with such captioning. The burdens, given the volume, cost, quick turnaround, and the short shelf-life of this programming are substantial. The